The Relationship Between Criminal or Juvenile Proceedings & Civil Actions Filed by Crime Victims

CHAPTER 12

In this chapter. . .

This chapter discusses the relationship between criminal or juvenile proceedings and civil actions instituted by crime victims. The chapter begins with brief descriptions of civil remedies commonly pursued by crime victims. It then discusses in more detail the relationship between criminal or juvenile delinquency proceedings and civil suits filed by victims.

The subjects discussed in this chapter include the following:

- civil remedies commonly pursued by crime victims, including tort actions and personal protection orders;
- statutes of limitations for tort actions commonly filed by crime victims, including the current state of the law regarding "repressed memories" of sexual assaults;
- the effect of an acquittal, conviction, or adjudication in criminal or juvenile proceedings on a crime victim's right to pursue civil remedies;
- a victim's ability to use a criminal judgment or juvenile adjudication as evidence in a civil suit against a defendant, juvenile, or juvenile's parent;

- a defendant's or juvenile's ability to assert the privilege against self-incrimination in civil suits filed by crime victims; and
- the relationship between restitution and damages awarded in a civil suit by a crime victim.

A complete discussion of civil remedies for crime victims is beyond the scope of this manual. The reader is urged to consult more complete sources for information on this topic.

12.1 Tort Actions That May Be Filed by Crime Victims

A "tort" is "[a] civil wrong for which a remedy may be obtained, usu[ally] in the form of damages." *Black's Law Dictionary* (St. Paul, MN: West, 7th ed, 1999), p 1496. Conduct that violates a criminal statute may also serve as the basis for a tort action by a person harmed by the criminal violation. "To ask concerning any occurrence 'Is this a crime or is it a tort?' is . . . no wiser than it would be to ask concerning a man 'Is he a father or a son?' For he may well be both." *Id.,* quoting Turner, *Kenny's Outline of Criminal Law* (16th ed, 1952), p 543. A crime victim may file a civil action alleging a tort based upon the defendant or juvenile's conduct that violated a penal statute. A victim may sue the offender, a third party whose negligence contributed to the victimization, or both.

A crime victim may sue a criminal defendant for an intentional tort. In many cases, conduct that constitutes a criminal act also constitutes an intentional tort. Examples include the following tort actions:

- assault, see SJI2d 115.01;
- battery, see SJI2d 115.02;
- civil action for violation of stalking or aggravated stalking statutes, MCL 600.2954; MSA 27A.2954;*
- infliction of emotional distress, *Atkinson v Farley,* 171 Mich App 784, 788 (1988); and
- wrongful death, MCL 600.2922 et seq.; MSA 27A.2922 et seq.

*For a more detailed discussion of this action, see Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Section 3.14(A).

A crime victim may also sue third parties, alleging that their negligence allowed the criminal victimization to occur. Examples of third-party suits that may be filed by crime victims include the following:

- a landlord's negligent failure to provide adequate security, *Johnston v Harris,* 387 Mich 569, 572–73 (1972), and *Samson v Saginaw Professional Building, Inc,* 393 Mich 393, 402 (1975);
- a business owner's negligent failure to expedite police involvement following criminal activity by third parties, *Williams v Cunningham*

Drug Stores, Inc, 429 Mich 495, 499 (1988), *Scott v Harper Recreation,* 444 Mich 441, 452 (1993), and *MacDonald v PKT,* __ Mich __ (June 26, 2001);

- "dramshop actions" (suits against retailers of alcoholic beverages that unlawfully serve intoxicated persons or minors, resulting in injury, death, or property damage), MCL 436.1801(3)–(11); MSA 18.1175 (801)(3)–(11); and
- parents' negligent failure to supervise their children, *Zapalski v Benton,* 178 Mich App 398, 403 (1989).*

*See Section 12.3, below, for further discussion of the *Zapalski* case.

12.2 Statutes of Limitations for Tort Actions

A tort claim must be filed within an applicable limitations period. The limitations periods for tort actions commonly filed by crime victims are listed below:

- assault—two years for non-domestic cases, MCL 600.5805(2); MSA 27A.5805(2);
- battery—two years for non-domestic cases, MCL 600.5805(2); MSA 27A.5805(2);
- assault or battery of a domestic partner where the plaintiff is 1) the defendant's spouse or former spouse; 2) a person with whom the defendant has a child in common; or 3) a person with whom the defendant resides or has formerly resided—five years, MCL 600.5805(3); MSA 27A.5805(3). This limitation applies to causes of action arising on or after February 17, 2000, and to causes of action for which the limitation period for non-domestic cases in MCL 600.5805(2); MSA 27A.5805(2) (assault or battery), had not expired as of February 17, 2000.
- "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805(9); MSA 27A.5805(9). This limitations period applies to actions other than those specifically listed in MCL 600.5805; MSA 27A.5805, such as intentional infliction of emotional distress and negligence.
- injury to person or property of a domestic partner where the plaintiff is 1) the defendant's spouse or former spouse; 2) a person with whom the defendant has a child in common; or 3) a person with whom the defendant resides or has formerly resided—five years, MCL 600.5805(10); MSA 27A.5805(10). This limitation applies to causes of action arising on or after February 17, 2000, and to causes of action for which the limitation period in MCL 600.5805(9); MSA 27A.5805(9) (death or injury to person or property), had not expired as of February 17, 2000.

- dramshop actions—two years after the death or injury, MCL 436.1801(4); MSA 18.1175(801)(4); and
- wrongful death—limitation period is governed by the statutory provision applicable to the underlying theory of liability (e.g., two years if the death resulted from a battery; three years if the death resulted from negligence), *Hardy v Maxheimer,* 429 Mich 422, 427 (1987).

The limitations period begins to run when "the claim first accrued to the plaintiff or to someone through whom the plaintiff claims." MCL 600.5805(1); MSA 27A.5805(1). Unless a statute provides otherwise, a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; MSA 27A.5827. Accrual of a claim is not delayed because the claimant is unaware of the identity of the alleged tortfeasor. *Fazzalare v Desa Industries, Inc,* 135 Mich.App. 1, 6 (1984) (filing a "John Doe" complaint does not interrupt the running of the applicable limitations period). But see MCL 600.5855; MSA 27A.5855, tolling the limitations period in cases of fraudulent concealment of a claim or identity of a person liable.

Some circumstances extend or "toll" (temporarily prevent the running of) the limitations period. For example, a person under a disability (under 18 years old or "insane") at the time a claim accrues has one year after the disability ceases to commence an action. MCL 600.5851(1) and (3); MSA 27A.5851(1) and (3). "Insanity" means "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." MCL 600.5851(2); MSA 27A.5851(2). In addition, if a person dies before or within 30 days after the applicable limitations period has run, actions that survive by law may be filed by the deceased's personal representative within three years after the limitations period has run. MCL 600.5852; MSA 27A.5852.

The "discovery rule" may also toll the applicable limitations period. This common-law rule provides that a plaintiff's tort claim does not accrue until he or she discovers, or should have discovered through the exercise of reasonable diligence, an injury and the causal connection between that injury and the defendant's misconduct. *Moll v Abbott Laboratories,* 444 Mich 1, 16 (1993). Application of the "discovery rule" is appropriate where the alleged injury is latent, or where there is a verifiable basis for the plaintiff's inability to discover the connection between the alleged injury and the defendant's misconduct. *Nelson v Ho,* 222 Mich App 74, 86 (1997) (assuming without deciding that the "discovery rule" applies to actions alleging intentional infliction of emotional distress).

In *Lemmerman v Fealk,* 449 Mich 56, 61–63 (1995), the plaintiffs in two consolidated cases filed tort suits alleging that they had been sexually abused 40 to 50 years prior to filing their lawsuits. Both plaintiffs alleged that they

had repressed memories of the assaults as a way of coping with the psychological harm caused by the abuse. The plaintiffs argued that the limitations period should be extended by the "discovery rule" or because they were suffering from "insanity," as defined in MCL 600.5851(2); MSA 27A.5851(2). *Lemmerman, supra,* at 64–65. Emphasizing courts' inability to verify such claims, the Court in *Lemmerman* held that neither the "discovery rule" nor MCL 600.5851(2); MSA 27A.5851(2), "extends the limitation period for tort actions allegedly delayed because of repression of memory of the assaults underlying the claims." *Lemmerman, supra,* at 76–77. Moreover, the Court further held that neither device is sufficient to toll the limitations period, "even upon presentation of allegedly 'objective and verifiable evidence' of a plaintiff's claim." *Id.* at 77.

Following the Michigan Supreme Court's decision in *Lemmerman,* two Michigan Court of Appeals decisions addressed whether there was an exception to the rule set forth in *Lemmerman* where the defendant made express, unequivocal admissions of the charged sexual misconduct. In *Lemmerman, supra,* at 77 n 15, the Michigan Supreme Court stated as follows:

> "We do not address the result of those repressed memory cases wherein long-delayed tort actions based on sexual assaults were allowed to survive summary disposition because of the defendants' admissions of sexual contact with the plaintiffs when they were minors. *Meiers-Post [v Schafer,* 170 Mich App 174; 427 NW2d 606 (1988)]; *Nicolette v Carey,* 751 F Supp 695 (WD Mich, 1990). Such express and unequivocal admissions take these cases outside the arena of stale, unverifiable claims with which we are concerned in the present cases."

In *Guerra v Garratt,* 222 Mich App 285, 292 (1997), the Court of Appeals held that the footnote quoted above addressed only the application of the rule announced in *Lemmerman* to cases filed before the opinion was issued and did not create an exception to that rule. The Court in *Guerra* reasoned that if the Supreme Court in *Lemmerman* had meant to create an exception to its holding, the Court would have done so in the body of its opinion rather than in a footnote. Thus, even though a defendant in *Guerra* admitted to sexual contact with the plaintiff, such an admission was insufficient to toll or extend the limitations period for a tort action delayed by repressed memories of the misconduct. *Guerra, supra,* at 290.

In *Demeyer v Archdiocese of Detroit (On Remand, On Rehearing),* 233 Mich App 409, 411–12 (1999), another Court of Appeals panel held that although it disagreed with the prior holding in *Guerra,* it was required to follow that holding by MCR 7.215(H)(1).* This court rule requires panels of the Court of Appeals to follow rules set forth in prior published decisions of the Court issued on or after November 1, 1990, that have not been reversed or modified by the Supreme Court or by a special "conflict resolution panel" of the Court

*See current MCR 7.215(I)(1).

of Appeals. Were it not constrained to follow *Guerra,* the Court in *Demeyer* would have held "that repressed memory cases supported by admissions may fall outside *Lemmerman*" if the claims are verifiable. *Demeyer, supra,* at 418. The Michigan Supreme Court denied leave to appeal in *Demeyer. Demeyer v Archdiocese of Detroit,* 461 Mich 1004 (2000). See *Id.* (Weaver, CJ, concurring) (because the defendant's admission of massaging the plaintiff was not an express, unequivocal admission of sexual conduct, the Supreme Court could not consider whether an exception to the general rule set forth in *Lemmerman* should be instituted).

12.3 The "Parental Liability Statute" and Negligent Supervision of Children

MCL 780.799; MSA 28.1287(799), provides that, upon request, a victim shall be given a certified copy of the order of an adjudicative hearing for purposes of obtaining relief under the "parental liability statute," MCL 600.2913; MSA 27A.2913. This statute provides for vicarious and strict liability of the parents of an unemancipated minor who has willfully or maliciously destroyed real or personal property or caused bodily harm or injury to another. The statute limits recovery to $2,500.00. MCL 600.2913; MSA 27A.2913, states:

> "A municipal corporation, county, township, village, school district, department of the state, person, partnership, corporation, association, or an incorporated or unincorporated religious organization may recover damages in an amount not to exceed $2,500.00 in a civil action in a court of competent jurisdiction against the parents or parent of an unemancipated minor, living with his or her parents or parent, who has maliciously or willfully destroyed real, personal, or mixed property which belongs to the municipal corporation, county, township, village, school district, department of the state, person, partnership, corporation, association, or religious organization incorporated or unincorporated or who has maliciously or willfully caused bodily harm or injury to a person."

In *McKinney v Caball,* 40 Mich App 389, 390–91 (1972), the Court of Appeals noted that the "parental liability statute" was enacted in derogation of the common law, which did not provide for parents' liability for the conduct of their children. Thus, the statute must be strictly construed to require plaintiffs to show the juvenile's malicious or willful destruction of property or bodily harm before they may recover any damages from the parents.

A plaintiff may choose to sue a juvenile's parent for negligent supervision rather than proceeding under MCL 600.2913; MSA 27A.2913. "Parents may be held liable for failing to exercise the control necessary to prevent their children from intentionally harming others if they know or have reason to

know of the necessity and opportunity for doing so." *Zapalski v Benton,* 178 Mich App 398, 403 (1989), citing *Dortman v Lester,* 380 Mich 80, 84 (1968).

In *Zapalski, supra,* the parents of a 14-year-old boy who allegedly sexually assaulted a 14-year-old girl were found not liable for negligently failing to supervise their son. Although their son had a history of delinquent behavior, nothing in their son's background would have enabled his parents to foresee his sexually assaultive behavior.

12.4 Personal Protection Orders

Personal protection orders supplement the protections crime victims receive under the criminal law. The Legislature has created two types of personal protection orders ("PPOs"), distinguished by the categories of persons who may be restrained:

- "Domestic relationship PPOs" under MCL 600.2950; MSA 27A.2950, are available to restrain behavior (including stalking) that interferes with the petitioner's personal liberty, or that causes a reasonable apprehension of violence, if the respondent and petitioner 1) are spouses or former spouses; 2) have a child in common; 3) reside or have resided in the same household. MCL 600.2950(1); MSA 27A.2950(1).
- "Non-domestic stalking PPOs" under MCL 600.2950a; MSA 27A.2950(1), are available to enjoin stalking behavior by any person, regardless of that person's relationship with the petitioner.

Persons violating PPOs are subject to warrantless arrest or immediate apprehension and to both civil and criminal contempt sanctions. Offenders age 17 and older who are found guilty of criminal contempt shall be imprisoned for not more than 93 days and may be fined up to $500.00. Offenders who are under age 17 are subject to the dispositional alternatives contained in the Juvenile Code. MCL 600.2950(23); MSA 27A.2950(23), and MCL 600.2950a(20); MSA 27A.2950(1)(20). A detailed discussion of the issuance and enforcement of personal protection orders is beyond the scope of this manual.*

*For a complete discussion of personal protection orders, see Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Chapters 7–9.

12.5 The Outcome of Criminal or Juvenile Proceedings Does Not Bar a Subsequent Civil Action by a Crime Victim

Because the standard of proof is lower in civil cases than it is in criminal cases, an acquittal on criminal charges does not bar a subsequent civil suit based on the same conduct. *Helvering v Mitchell,* 303 US 391, 397; 58 S Ct 630; 82 L Ed 917 (1938). In most civil actions, the plaintiff must prove all elements of a claim by a preponderance of the evidence. See SJI2d 8.01 (plaintiff must prove his or her claim with "evidence which outweighs the

evidence against it"). In criminal and juvenile delinquency proceedings, the prosecuting attorney must prove each element of a charged offense beyond a reasonable doubt. *Mullaney v Wilbur,* 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), *In re Winship,* 397 US 358, 366–68; 90 S Ct 1068; 25 L Ed 2d 368 (1970), and MCR 5.942(C).

A conviction or adjudication in criminal or juvenile proceedings does not prevent a crime victim from filing a civil suit based upon the same conduct. The Double Jeopardy Clauses of the state and federal constitutions prohibit multiple convictions or punishments for the same offense. US Const, Am V, and Const 1963, art 1, § 15. See also *Breed v Jones,* 421 US 519, 531; 95 S Ct 1779; 44 L Ed 2d 346 (1975) (jeopardy attaches during juvenile delinquency proceedings). However, "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v Halper,* 490 US 435, 451; 109 S Ct 1892; 104 L Ed 2d 487 (1989), overruled on other grounds 522 US 93 (1997) ("nothing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment").

> **Note:** The cases discussed above deal with the effect of the outcome of a prior criminal or juvenile proceeding on a civil suit arising from the same conduct. In most cases, the outcome of a prior civil proceeding does not affect the prosecuting attorney's ability to file a subsequent criminal action. The Michigan Supreme Court has held that a jury verdict of "no jurisdiction" in a civil child protective proceeding does not bar a subsequent criminal prosecution based on the same conduct. *People v Gates,* 434 Mich 146, 163 (1990).

*See Section 3.2(A) for further discussion of setting aside convictions or adjudications.

A criminal defendant or juvenile who has only been convicted or adjudicated for one offense may apply to set aside or "expunge" his or her sole conviction or adjudication. If the court grants the application and sets aside the sole conviction or adjudication of the applicant, the applicant, for purposes of the law, shall be considered never to have been convicted or adjudicated for the offense. However, expungement does not affect a victim's right to prosecute or defend a civil action for damages. MCL 780.622(5); MSA 28.1274(102)(5), and MCL 712A.18e(11)(c); MSA 27.3178(598.18e)(11)(c).*

12.6 The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

A crime victim who brings a civil suit against his or her offender may seek to admit into evidence the judgment of sentence or order of adjudication entered in a criminal or juvenile case to help prove the defendant's or juvenile's civil liability.* Because the same parties are not present in both the criminal and civil litigation, a convicted criminal defendant is not precluded from contesting his or her civil liability in a subsequent suit. *Lichon v American Universal Ins Co,* 435 Mich 408, 426–31 (1990). See also *In re Shaw,* 210 BR 992, 1002 (WD Mich, 1997) (the doctrine of "mutuality of estoppel" remains the law in Michigan). Although the judgment or order itself is admissible in a civil proceeding, there are limitations on use of evidence from plea proceedings in criminal cases. These limitations are addressed in Section 12.6(A), below. In addition, the use of testimony from a juvenile delinquency proceeding is prohibited by statute. See Section 12.6(B), below.

*In cases under the juvenile article of the CVRA, a victim is entitled to a certified copy of the adjudicative order so that he or she may recover under the "parental liability statute." See Section 12.3, above.

A copy of a court order or judgment of any court of record in Michigan, properly authenticated, is admissible in evidence and is prima facie evidence of any facts *recited in the order or judgment.* MCL 600.2106; MSA 27A.2106. "[A] criminal conviction after trial, or plea, or payment of fine is not admissible *as substantive evidence of conduct* at issue in a civil case arising out of the same occurrence." *Wheelock v Eyl,* 393 Mich 74, 79 (1974) (emphasis added).

Despite the Michigan Supreme Court's holding in *Wheelock,* a Michigan rule of evidence appears to allow admission of a judgment of conviction as substantive evidence of conduct at issue in a subsequent civil case. Michigan Rule of Evidence 803(22) provides an exception to the prohibition against hearsay evidence for a final judgment rendered in a previous criminal case in which the defendant was convicted of a felony or two-year misdemeanor. That rule states:

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, [is admissible] to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

Thus, if the defendant was convicted of a felony or two-year misdemeanor following a guilty plea or trial, MRE 803(22) allows the judgment to be used as evidence to prove that the defendant committed the acts that led to the previous conviction. Although evidence of a misdemeanor conviction is

inadmissible under MRE 803(22), evidence of a plea to a misdemeanor offense other than a motor vehicle violation would be admissible under MRE 801(d)(2)(a) as an admission by a party-opponent.

A. Limitations on the Use of Evidence of Pleas in Criminal Cases

*MRE 410 also applies in criminal proceedings.

Michigan Rule of Evidence 410 limits a crime victim's ability to use in a civil proceeding a criminal defendant's statements made while discussing or entering a plea.* Under MRE 410(1)–(4), the following evidence is inadmissible against a defendant who made a plea or participated in plea discussions:

> "(1) A plea of guilty which was later withdrawn;
>
> "(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> "(3) Any statement made in the course of any proceedings under MCR 6.302* or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> "(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

*MCR 6.302 addresses the requirements for guilty and nolo contendere pleas.

Such statements are admissible in a subsequent civil proceeding if "another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it . . . ." MRE 410.

When considering whether to accept a nolo contendere plea, the court must hold a hearing on the factual basis for the plea and state why such a plea is appropriate. MCR 6.302(D)(2). A number of appropriate reasons to allow acceptance of nolo contendere pleas have been recognized, including minimizing civil liability. *Guilty Plea Cases,* 395 Mich 96, 134 (1975). In *Lichon v American Universal Ins Co,* 435 Mich 408, 415 (1990), the Michigan Supreme Court held that a nolo contendere plea was not an admission of guilt that could be used in a subsequent civil proceeding against the defendant who entered the plea. The rule set forth in *Lichon* was later modified by MRE 410(2), which allows the use of evidence of such a plea to support a defense against a claim by the person who entered the plea.

B. Prohibition Against Use of Testimony From Juvenile Delinquency Proceedings

A provision of the Juvenile Code restricts the use of evidence from juvenile delinquency cases in subsequent proceedings. MCL 712A.23; MSA 27.3178(598.23), states as follows:

> "Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code]."

This statute is intended to proscribe the subsequent use of testimony taken at a juvenile delinquency proceeding. *People v Hammond,* 27 Mich App 490, 494 (1970). Thus, although an order of adjudication from a delinquency proceeding is admissible in a subsequent civil proceeding, testimony taken during a delinquency proceeding is inadmissible in a subsequent proceeding.

The prohibition contained in MCL 712A.23; MSA 27.3178(598.23), does not apply to designated proceedings.* The conviction of a juvenile following designated proceedings has "the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7); MSA 27.3178(598.2d)(7).

*See Section 3.2(H) for a description of designated proceedings.

12.7 Asserting the Privilege Against Self-Incrimination in Civil Suits

Both the state and federal constitutions prohibit compelled self-incrimination. US Const, Am V (no person "shall be compelled in any criminal case to be a witness against himself"), and Const 1963, art 1, § 17 ("[n]o person shall be compelled in any criminal case to be a witness against himself"). See also *In re Gault,* 387 US 1, 55; 87 S Ct 1428; 18 L Ed 2d 527 (1967) (privilege against self-incrimination applies to juvenile delinquency proceedings), and MCR 5.935(B)(4)(c) (privilege against self-incrimination applied to juvenile delinquency proceedings in Michigan). Despite its reference to criminal proceedings, US Const, Am V, "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *People v Wyngaard,* 462 Mich 659, 671–72 (2000), quoting *Minnesota v Murphy,* 465 US 420, 426; 104 S Ct 1136; 79 L Ed 2d 409 (1984).

However, the application of the privilege against self-incrimination to civil proceedings does not allow a witness in a civil suit to refuse to testify at all. A statute, MCL 600.2154; MSA 27A.2154, sets forth this limitation on the application of the privilege against self-incrimination:

> "Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses."

A witness in a civil suit must take the stand when called as a witness and may not invoke the privilege "'until testimony sought to be elicited will in fact tend to incriminate.'" *People v Ferency,* 133 Mich App 526, 533–34 (1984), quoting *Brown v United States,* 356 US 148, 155; 78 S Ct 622; 2 L Ed 2d 589 (1958). The trial judge must determine whether the witness's answer may have a tendency to incriminate him or her before ordering the witness to respond. *Ferency, supra,* at 534.

A. Drawing Adverse Inferences From Assertion of the Privilege

The Fifth Amendment to the United States Constitution does not forbid the drawing of adverse inferences against parties to civil suits who refuse to testify. See *Baxter v Palmigiano,* 425 US 308, 318; 96 S Ct 1551; 47 L Ed 2d 810 (1976) (unlike in a criminal trial, plaintiff's attorney may comment on the defendant's refusal to respond to a question), *Phillips v Deihm,* 213 Mich App 389, 400 (1995) (summary judgment was proper against a defendant in a civil suit alleging sexual abuse where defendant refused to set forth specific facts showing a genuine issue of fact for trial), and *Albert v Chambers,* 335 Mich 111, 114 (1952) (facts not denied by the defendant were properly deemed admitted, despite the fact that the defendant may have been subject to criminal liability based on such admissions).

B. Remedies to Protect Defendant's or Juvenile's Privilege Against Self-Incrimination

To protect a defendant's or juvenile's privilege against self-incrimination, courts may stay civil proceedings pending the outcome of criminal or juvenile delinquency proceedings. A court has inherent authority to stay a proceeding pending the outcome of a separate action even though the parties to both proceedings are not the same. *Landis v North American Co,* 299 US 248, 254–55; 57 S Ct 163; 81 L Ed 153 (1936). In addition, courts may enter protective orders regarding material sought during discovery. MCR 2.302(B)(1)

(privileged material not discoverable) and 2.302(C) (a court "may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .").

In *Massey v City of Ferndale,* 206 Mich App 698, 700–01 (1994), two plaintiffs filed a civil suit alleging false arrest and other torts, and one of the plaintiffs was criminally charged with carrying a concealed weapon. Both plaintiffs refused to participate in discovery in their civil suit, asserting their privilege against self-incrimination. The trial court stayed proceedings in the civil suit but ultimately dismissed the suit without prejudice for the plaintiffs' failure to permit discovery, despite the fact that the criminal case was being appealed. The Court of Appeals upheld the sanction of dismissal without prejudice, finding that the trial court protected the plaintiffs' Fifth Amendment rights by issuing the stay until trial proceedings in the criminal case were concluded. The Court of Appeals also found the sanction of dismissal without prejudice did not constitute a substantial penalty for the plaintiffs' exercise of their privilege against self-incrimination. *Id.* at 702–03.

In *In re Stricklin,* 148 Mich App 659, 663–66 (1986), the Court of Appeals reviewed the trial court's refusal to adjourn a civil child protective proceeding during the pendency of concurrent criminal proceedings based on the same alleged conduct and found no violation of the parents' privilege against compelled self-incrimination under US Const, Am V, and Const 1963, art 1, § 17. The parents did not testify during the civil proceeding and were eventually convicted following a criminal proceeding. The issue was "whether a penalty was exacted" for their refusal to testify "sufficient to amount to the kind of compulsion contemplated by the Fifth Amendment." *Id.* at 664. The Court of Appeals held that the purported penalty—the increased risk of loss of parental rights by refusing to testify during the protective proceeding—did not amount to compulsion prohibited by the state and federal constitutions. The parents' asserted increased risk of loss of their parental rights implied that they would present nonincriminating testimony during the civil proceedings, making their choice not to give nonincriminating testimony a matter of trial strategy, not a matter of protecting their constitutional rights. *Id.* at 665.

12.8 Required Set Off of Compensatory Damages Against Restitution

A restitution order entered in a criminal case does not act as a bar to the recovery of damages in a civil action arising out of the same incident. *Aetna Casualty & Surety Co v Collins,* 143 Mich 661, 663 (1985).*

*See Section 10.20(A) for discussion of proceedings to enforce a restitution order.

If the victim recovers compensatory damages in a civil suit resulting from the offense, the amount of compensatory damages must be reduced by the amount of restitution received by the victim. MCL 780.766(9); MSA 28.1287(766)(9), MCL 780.794(9); MSA 28.1287(794)(9), and MCL 780.826(9); MSA 28.1287(826)(9), state in relevant part:

> "Any amount paid to a victim or victim's estate under an order of restitution shall be set off against any amount later recovered *as compensatory damages* by the victim or the victim's estate in any federal or state civil proceeding . . . ." [Emphasis added.]

Because the foregoing statute only applies to compensatory damages, any amount of exemplary damages awarded to a victim in a civil suit is not reduced by the amount of restitution ordered in a criminal case. Exemplary damages "are awardable where the defendant commits a voluntary act which inspires feelings of humiliation, outrage, and indignity. The conduct must be malicious or so wilful and wanton as to demonstrate a reckless disregard of the plaintiff's rights." *Jackson Printing Co v Mitan,* 169 Mich App 334, 341 (1988). In addition, a statute may provide for an award of exemplary damages. See, e.g., MCL 600.2954; MSA 27A.2954 (exemplary damages may be awarded in a civil action for stalking). Punitive damages are not available in Michigan. *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401 (1980).

12.9 Prohibition Against Civil Suit by Defendant While Sexual Assault Case Is Pending

MCL 600.1902(2); MSA 27A.1902(2), prohibits a defendant charged with criminal sexual conduct in any degree or with assault with intent to commit criminal sexual conduct from commencing or maintaining a civil action against the victim. This prohibition applies if both of the following are true:

> "(a) The criminal action is pending in a trial court of this state, of another state, or of the United States.
>
> "(b) The civil action is based upon statements or reports made by the victim that pertain to an incident from which the criminal action is derived." MCL 600.1902(2)(a)–(b); MSA 27A.1902(2)(a)–(b).

If a defendant files a suit in violation of this provision, the court must dismiss the action without prejudice. MCL 600.1902(3); MSA 27A.1902(3). The limitations period for bringing a civil action described in MCL 600.1902(2); MSA 27A.1902(2), "is tolled for the period of time during which the criminal action is pending in a trial court of this state, of another state, or of the United States." MCL 600.1902(4); MSA 27A.1902(4).*

*See Section 12.2, above, for a brief discussion of "tolling" limitations periods.

This prohibition does not apply "if the victim files a civil action based upon an incident from which the criminal action is derived against the defendant in the criminal action." MCL 600.1902(5); MSA 27A.1902(5). The definition of "victim" includes the parent, guardian, or custodian of a person less than 18 years old or a mentally incapacitated person. MCL 600.1902(1)(b)–(c); MSA 27A.1902(1)(b)–(c).

For a description of cases that gave rise to the passage of MCL 600.1902; MSA 27A.1902, see Manley, *Civil compensation for the victim of rape,* 7 Cooley L R 193, 197 (1991), and *Rosenboom v Vanek,* 182 Mich App 113 (1989).

12.10 Recovering Proceeds From Defendant or Juvenile Under Michigan's "Son of Sam" Law

Under all three articles of the Crime Victim's Rights Act ("CVRA"), a defendant or juvenile may be prevented from receiving profits from the sale of his or her thoughts, recollections, or feelings about the offense. The relevant provisions of the CVRA are often referred to as Michigan's "Son of Sam" law, a reference to a notorious case that gave rise to similar statutory provisions in the state of New York. MCL 780.768(1); MSA 28.1287(768)(1), in the felony article of the CVRA, states:

> "A person convicted of a crime shall not derive any profit from the sale of his or her recollections, thoughts, and feelings with regard to the offense committed by that person until the victim receives any restitution or compensation ordered for him or her against the defendant and expenses of incarceration are recovered as provided in subsection (3) and until the escrow account created under subsection (2) is terminated under subsection (4)."

MCL 780.797(1); MSA 28.1287(797)(1), of the juvenile article, and MCL 780.831(1); MSA 28.1287(831)(1), of the misdemeanor article, contain substantially similar provisions.

Enforcement of the foregoing provision is initiated by the prosecuting attorney or attorney general. After conviction or disposition of a crime, juvenile offense, or serious misdemeanor involving a victim, "and after notice to any interested party," the prosecuting attorney from the county in which the conviction or disposition occurred or the attorney general may petition the court in which the conviction or disposition occurred. This petition requests the court to order:

> ". . . that defendant forfeit all or any part of proceeds received or to be received by the defendant, or the defendant's representatives or assignees, from contracts relating to the depiction of the crime or the defendant's recollections, thoughts, or feelings about the crime, in books, magazines, media entertainment, or live entertainment, as provided in this section. The proceeds shall be held in escrow for a period of not more than 5 years." MCL 780.768(2); MSA 28.1287(768)(2) (felony article of the CVRA). See also MCL 780.797(2); MSA 28.1287(797)(2), and MCL 780.831(2); MSA

28.1287(831)(2), for substantially similar provisions in the juvenile and misdemeanor articles of the CVRA.

After an escrow account is established, the proceeds in the account must be used to satisfy the following, in descending order of priority:

> "(a) An order of restitution entered under [the CVRA].
>
> "(b) Any civil judgment in favor of the victim against that defendant.
>
> "(c) Any reimbursement ordered under the prisoner reimbursement to the county act, [MCL 801.81; MSA 28.1770(1), to MCL 801.93; MSA 28.1770(13)], or ordered under the state correctional facility reimbursement act, [MCL 800.401; MSA 28.1701, to MCL 800.406; MSA 28.1708]." MCL 780.768(3)(a)–(c); MSA 28.1287(768)(3)(a)–(c) (felony article of the CVRA). See also MCL 780.797(3)(a)–(c); MSA 28.1287(797)(3)(a)–(c), and MCL 780.831(3)(a)–(c); MSA 28.1287(831)(3)(a)–(c), for substantially similar provisions in the juvenile and misdemeanor articles of the CVRA.*

*Under the juvenile article of the CVRA, funds must be used to reimburse the costs of detaining the juvenile. MCL 780.797(3)(c); MSA 28.1287(797)(3)(c).

At the end of the five-year escrow period, any balance remaining in the account must be paid to the Crime Victim's Rights Fund.* MCL 780.768(4); MSA 28.1287(768)(4), MCL 780.797(4); MSA 28.1287(797)(4), and MCL 780.831(4); MSA 28.1287(831)(4).

*See Section 2.8 for a description of this fund.

In *Simon & Schuster, Inc v New York State Crime Victims Board,* 502 US 105, 123; 112 S Ct 501; 116 L Ed 2d 476 (1991), the United States Supreme Court held that New York's "Son of Sam" law was inconsistent with the First Amendment to the United States Constitution. Because it found that the New York statute was directed at the content of expression, the Supreme Court applied the "strict scrutiny" standard of review. *Id.* at 116. The state was required to show that the statute was necessary to serve a compelling state interest and was narrowly drawn to achieve that end. *Id.* at 118. The Supreme Court found that the state has a compelling interest in ensuring that crime victims are compensated by their offenders, and that offenders do not profit from their offenses. *Id.* at 118–19. However, the Supreme Court rejected the assertion that the state has a compelling interest in compensating crime victims only from offenders' profits derived from stories about their offenses. *Id.* at 119–20. Furthermore, New York's "Son of Sam" law was not narrowly tailored to achieve its legitimate ends. New York's law applied to works on any subject that included thoughts on an offense, and to works by any author, regardless of whether the author had been charged or convicted of an offense. *Id.* at 120–23.

Because no Michigan case has addressed the constitutionality of Michigan's "Son of Sam" law, it is unclear whether it would survive review under the "strict scrutiny" standard. However, there are significant differences between the New York law construed in *Simon & Schuster* and Michigan's statutes. For an analysis of these differences, see Note, *Bearing the burden of strict scrutiny in the wake of Simon & Schuster, Inc. v Members of the New York State Crime Victims Board: A constitutional analysis of Michigan's "Son of Sam" law,* 70 U Det Mercy L R 191 (1992).